United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Orig w/affidavit of mailing

75-1419

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P/S

To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1419

UNITED STATES OF AMERICA,
Appellant,

—against—

DANIEL MACKLIN,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,

GARY A. WOODFIELD,
Assistant United States Attorney,
Of Counsel.

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UNITED STATES OF AMERICA,

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BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal by the United States, pursuant to 18 U.S.C. § 3731, from an order of the District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered on November 17, 1975, which granted the motion of the defendant, Daniel Macklin, to dismiss the indictment, 75 Cr. 563, on the ground that it is barred by the statute of limitations. The district court rejected the argument of the United States that the saving provisions of Title 18, United States Code, § 3288 applied, to make the indictment timely. Section 3288 provides that:

> "Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has

> expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations."

The district court reasoned that since the earlier indictment, 73 Cr. 497, was held to be a "nullity" because it was returned by an improperly extended grand jury [*United States* v. *Macklin*, 523 F.2d 193 (2d Cir. 1975); *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974)] the provisions of 18 U.S.C. § 3288 do not apply.

Statement of Facts

On May 16, 1973, a grand jury impanelled in the Eastern District of New York returned a twenty-five count indictment charging the defendant Daniel Macklin, Daniel Macklin, Inc. and Adam Equities, Inc., with numerous violations of 18 U.S.C. §1010 arising out of the submission of false statements in applications for federally insured mortgages.

On August 1, 1973, appellee, as part of a plea bargain, pled guilty to Counts Six and Twenty-Four of this indictment. Subsequently, this Court in *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974) affirmed the dismissal of an indictment returned by a grand jury which had been invalidly extended. Appellee had been indicted by this same grand jury its term had expired.

Prior to the imposition of sentence, appellee moved to withdraw his plea of guilty and to dismiss the indictment. Chief Judge Mishler, relying upon *United States* v. *Fein*,

370 F. Supp. 406 (E.D.N.Y. 1974), *affirmed*, 504 F.2d 1170 (2d Cir. 1974) granted both of the appellee's motions on January 29, 1975. The district court reasoned that an indictment returned by an improperly extended grand jury is a defect ". . . which renders the grand jury's action void *ab initio*. Since the grand jury had no power to indict, the court had no jurisdiction over the defendant" (App. 2a).

The United States appealed the district court's decision, contending that appellee's failure to move timely to dismiss the indictment pursuant to the Federal Rules of Criminal Procedure, Rules 12(b)(2) and 12(b)(3) constituted a waiver of the defect in the institution of the prosecution. On September 4, 1975, this Court affirmed the order dismissing the indictment. *United States* v. *Macklin*, 523 F.2d 193 (2d Cir. 1975).

In the meantime, on July 18, 1975, the appellee Daniel Macklin was indicted by a grand jury impanelled in the Eastern District of New York. This indictment, 75 Cr. 563, is identical in all material respects with the earlier indictment.*

On September 17, 1975, appellee moved to dismiss this new indictment on the grounds that it was time barred. On November 17, 1975, Chief Judge Mishler granted the appellee's motion dismissing the indictment. The district court rejected our contention that the time extending provisions of 18 U.S.C. § 3288 should apply. The district court reasoned that since the earlier indictent was held to be a "nullity", the provisions of 18 U.S.C. § 3288 are not applicable.

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* This Court in *United States* v. *Macklin*, *supra*, noting this new indictment stated: "We express no opinion on any matter effecting the second indictment." 523 F.2d at 197.

ARGUMENT

The time extending provisions of Title 18, U.S.C., § 3288 are applicable.

The issue before the Court is basically a simple one: Do the provisions of Title 18, U.S.C. Section 3288, which permit a new indictment within six months from the date of the dismissal of the first indictment, if the dismissal is based on "any error, defect, or irregularity with respect to the grand jury," apply in this case?

We concede, as we must in light of *United States* v. *Fein*, 503 F.2d 1107 (2d Cir. 1974) and *United States* v. *Macklin*, 523 F.2d 193 (2d Cir. 1975), that the indictment against the defendant Macklin returned by the improperly extended grand jury was fatally defective and was properly dismissed. Also, it is conceded that the instant indictment is time-barred unless the provisions of Section 3288 apply. We submit, however, as the Court has already indicated, that the defect here at issue is an "irregularity with respect to the grand jury" within the meaning of 18 U.S.C. Section 3288. *Wax* v. *Motley*, 510 F.2d 318, 320 (2d Cir. 1975).

Moreover, a reading of Section 3288, and an analysis of its underlying purpose, refutes Chief Judge Mishler's restrictive interpretation. Section 3288 states that a second indictment, returned within six months of the dismissal of an earlier indictment, satisfies the statute of limitations even though five years may have elapsed, where the first indictment is dismissed for " . . . any error, defect, or irregularity with respect to the grand jury." The language used—"any error, defect or irregularity . . ." is broad and all-encompassing. As this Court held in *United States* v. *Strewl*, 162 F.2d 819 (2d Cir.), *cert. denied*, 332 U.S. 801 (1947):

> "The purpose [of then 18 U.S.C. § 587, now § 3288] was to extend the statute of limitations, so that a person who had been indicted under an indictment which, as it turned out, would not support a conviction, should not escape because the fault was discovered too late to indict him again." Id. at 801.

Accord: *Hughes* v. *United States*, 114 F.2d 285 (6th Cir. 1940); *United States* v. *Bair*, 221 F. Supp. 171 (E.D. Wis., 1963); *United States* v. *Main*, 28 F. Supp. 550 (S.D. Texas 1939).

Moreover, the legislative history of Section 3288 plainly shows that Congress intended that it be given the broadest possible construction. Section 3288 was enacted in response to a request by the Department of Justice. Its purpose, as outlined in a letter from the Attorney General, was set out in full in *Untied States* v. *Durkee Famous Foods*, 306 U.S. 68, 71, n.2 (1939), is:

> "To safeguard the interest of the Government in such cases, legislation is recommended providing that in any case in which an indictment is found defective or insufficient *for any cause*, after the period prescribed by the statute of limitations has run, . . . a new indictment may be returned . . ." (emphasis added).

The Court in *United States* v. *Durkee Famous Foods*, *supra*, found that the statute that was subsequently enacted [§ 586 now § 3288] ". . . undertook to do exactly what the Attorney General asked." 306 U.S. at 71. It is clear, therefore, that Section 3288 was enacted to cover all situations when indictments are dismissed and the statute of limitations has expired. And, it is submitted that Chief Judge Mishler's conclusions limiting the scope of Section 3288 and distinguishing between defects that

would trigger its application and those that would not, ill serves the stated purpose of Section 3288.

Finally, this case presents a compelling factual basis for the obvious applicability of Section 3288. The defendant Macklin admitted in open court his guilt to offenses charged in an indictment that was later found to be returned by an improperly extended grand jury. Moreover, for whatever reason, his motion to dismiss the indictment was not timely made, indeed, it was made 16 months after he was indicted. In these circumstances, the exception engrafted on Section 3288 plainly operates to frustrate its acknowledged purpose.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with directions to the district court to reinstate the indictment.

Dated: February 4, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

GARY A. WOODFIELD,
Assistant United States Attorney,
Of Counsel.

APPENDIX

Memorandum of Decision and Order dated January 29, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73-CR-497

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

Defendants move, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, for an order dismissing the indictment against them. In addition, defendant Macklin moves to withdraw his plea of guilty to the indictment.

As a basis for both motions defendants assert that the court was without jurisdiction over the offense charged because the term of the grand jury which handed down the indictment had been improperly extended. In his decision in *United States* v. *Fein*, 370 F. Supp. 466 (E.D.N.Y. 1974), Judge Dooling determined that this same grand jury had been invalidly extended. Judge Dooling concluded that as a result of this fact, the indictments prepared by the grand jury were invalid. *Id.* at 468-69. In addition, he pointed out that this defect was not merely a technical irregularity which was waived by entry of a guilty plea. Instead, Judge Dooling found that this was an error "that goes to jurisdiction." *Id.* at 469. The Court of Appeals affirmed the *Fein* decision, 504 F.2d 1170 (2d Cir. 1974). *Cf. Wax* v. *Motley*, — F.2d — (2d Cir. Jan. 21, 1975, Docket No. 75-3003).

Memorandum of Decision and Order dated January 29, 1975

On the authority of *Fein* the defendant Daniel Macklin's plea is withdrawn and the indictment dismissed as against him. The government argues that although the improper extension made the grand jury's indictment invalid, this objection was waived by defendant's entry of a plea of guilty. In support of this position the government asserts that the language of Rule 12(b)(2) includes as objections which are waived by the entry of a plea irregularities such as the "illegal . . . organization" of the grand jury. In addition, the government points to two recent decisions of the Supreme Court in which it was determined that entry of a guilty plea had the effect of waiving objections to the unconstitutional formation of the grand jury. *Davis* v. *United States*, 411 U.S. 233, 93 S.Ct. 1577 (1973); *Tollett* v. *Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973).

However, the situation is different where, as here, the defect is one which renders the grand jury's actions void *ab initio*. Since the grand jury had no power to indict, the court had no jurisdiction over the defendant. Furthermore, a defect of this nature can be raised at any time in the proceedings; it cannot be waived.

Nor can the indictment be saved by the suggestion, advanced by the government, that Macklin's plea to the invalid indictment was in effect a plea to an information, since the United States Attorney signed the indictment which was brought by him and the grand jury. Because Macklin faced a term of imprisonment in excess of a year if convicted, the Fifth Amendment required that he be pro-

ceeded against by an indictment returned by a grand jury.[1] His plea of guilty to the indictment cannot be interpreted as a waiver of that constitutional right.

The situation is different, however, wtih respect to the corporate defendants. As to these defendants the indictment is effective as a charging instrument because the corporation could be proceeded against by an information. The corporate defendants, unlike defendant Macklin, are not subject to any term of imprisonment if convicted of the charges against them. Accordingly, the charges against them are not "infamous" within the meaning of the Fifth Amendment, (see n. 1 *supra*). The indictment, signed by the United States Attorney, indicating his agreement with the grand jury in the institution of a criminal proceeding, is effective as an information. *United States* v. *Wright*, 365 F.2d 135, 137 (7th Cir. 1966). Therefore, the defect in the grand jury proceeding does not render the indictment invalid against the corporations. Instead, the indictment is proper as an information and the motion to dismiss the indictment is denied.

Defendant Macklin's motions to dismiss and to withdraw his plea are granted; the corporate defendants' motion to dismiss is denied and it is

So ORDERED.

JACOB MISHLER
U.S.D.J.

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[1] The Fifth Amendment provides in relevant part that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." An infamous crime has been defined as one which is punishable by imprisonment for a term exceeding one year. *E.g. Green* v. *United States*, 356 U.S. 165, 78 S.Ct. 632 (1958).

Memorandum of Decision and Order dated March 27, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 497

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN, DANIEL MACKLIN, INC. and ADAM EQUITIES, INC.,

Defendants.

The government's motion to reargue or modify the memorandum of decision and order dated January 29, 1975 is granted to the extent that a further ordering paragraph is hereby added to the last paragraph of the memorandum of decision as follows:

The court finding that the indictment filed is a nullity, the indictment as against the defendant, Daniel Macklin, is dismissed on the court's own motion, and it is

SO ORDERED.

JACOB MISHLER
U.S.D.J.

Memorandum of Decision and Order dated November 17, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 75-CR-563

UNITED STATES OF AMERICA,

—against—

DANIEL MACKLIN,

Defendant.

Defendant moves to dismiss the 25 count indictment pursuant to Criminal Rule 12(a) on the ground that all the charges alleged in the counts are time barred. The indictment was filed in the office of Clerk of the Court on July 18, 1975. The latest date of claimed criminal activity is found in count 25; it alleges a conspiracy from, on, or about October 21, 1968, to on or about January 26, 1970, to make, utter, and publish false statements in violation of 18 U.S.C. § 1010. The Government concedes that the indictment was untimely filed unless the case falls within the time extended under 18 U.S.C. § 3288.[1]

[1] § 3288 states in pertinent part:

"Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the Grand Jury . . . after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment. . . ."

Memorandum of Decision and Order dated November 17, 1975

On January 29, 1975, this court dismissed an indictment based on the same facts on the ground that the indictment had been returned after the term of the Grand Jury had expired and during an invalidly extended period of time. The writer held that the indictment was a nullity. *U.S.* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974). The order of dismissal was affirmed in *United States* v. *Macklin*, Nos. 75-1189 & 3031 (2d Cir. Sept. 4, 1975). The indictment was dismissed because it was a nullity. The term of the statute of limitations was not extended under 18 U.S.C. § 3288.

The indictment is dismissed and it is

So ORDERED.

JACOB MISHLER
U.S.D.J.

Opinion of the Court of Appeals Dated September 4, 1975 523 F.2d 193

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

No. 1235, Dockets 75-1189, 75-3031.

Argued Aug. 13, 1975.

Decided Sept. 4, 1975.

UNITED STATES OF AMERICA,

Appellant,

—v.—

DANIEL MACKLIN,

Defendant-Appellee.

GURFEIN, Circuit Judge:

The United States appeals from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Chief Judge*, which granted the motions of defendant, Daniel Macklin, to withdraw his plea of guilty under Fed.R.Crim.P. 32(d) and to dismiss the indictment on the ground that the term of the grand jury which returned the indictment had been improperly extended. The appeal is pursuant to 18 U.S.C. § 3731, as amended by Act of Jan. 2, 1971, Pub.L.No.91-644, 84 Stat. 1890. The government also petitions for mandamus requiring the District Court to withdraw its order permitting withdrawal of the guilty plea or directing its reconsideration of that order.

On May 16, 1973, defendant was indicted on 25 counts of violating 18 U.S.C. § 1010 by submitting false statements in applications for federally insured mortgages. On August 1, 1973, appellee, as part of a plea bargain,

withdrew his plea of not guilty to two counts of the indictment and entered a plea of guilty to those counts. This court later decided *United States* v. *Fein*, 504 F.2d 1170 (2 Cir. 1974). There we affirmed the dismissal of an indictment on the ground that the term of the grand jury which returned it had been improperly extended. Macklin had been indicted by the *same* grand jury after its term had expired.[1] Appellee moved to withdraw his guilty plea and to dismiss the indictment on the basis of our decision in *Fein*. Chief Judge Mishler granted both motions. We are informed that Macklin has been re-indicted.

[1] Since Macklin had not yet been sentenced, Chief Judge Mishler probably could have permitted withdrawal of the guilty plea in his discretion. Furthermore, our appellate jurisdiction to mandamus a District Judge for granting an application to withdraw a guilty plea before sentence is by no means crystal clear. Compare *United States* v. *DiStefano*, 464 F.2d 845 (2 Cir. 1972), with *United States* v. *Dooling*, 406 F.2d 192, 198-99 (2d Cir.), *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969). On the other hand, dismissal of the indictment is appealable by the United States under the 1971 amendment to section 3731. See *United States* v. *DiStefano*, *supra*, 464 F.2d at 846-47; *United States* v. *Crutch*, 461 F.2d 1200 (2 Cir.), *cert. denied*, 409 U.S. 883, 93 S.Ct. 172, 34 L.Ed.2d 139 (1972).

The government concedes that if the defendant had made a timely motion, the indictment should have been dismissed in view of *United States* v. *Fein*.

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[1] The expiration date of the grand jury, if its term was not validly extended, was September 17, 1972. *United States* v. *Fein*, 370 F. Supp. 466, 467 (E.D.N.Y. 1974).

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523 F.2d 193

[2] The issue is whether the defect we found in *Fein*—that there was no proper grand jury—is merely a defect "in the institution of the prosecution," which may be raised only by motion before trial, Fed.R.Crim.P. 12(b)(2), or whether it amounts to a "lack of jurisdiction," in which case it "shall be noticed by the court at any time during the pendency of the proceeding." *Id.* Chief Judge Mishler held that the defect was not merely in the "institution of the prosecution" but that it left the court without jurisdiction. We are constrained to agree.

It is surely anomalous that a man who has admitted his guilt should be permitted to challenge the indictment to which he has pleaded guilty. "Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." *Smith* v. *United States*, 360 U.S. 1, 9, 79 S.Ct. 991, 996, 3 L.Ed.2d 1041 (1959).

[3-5] Yet it has long been the rule that the grand jury is a creature of statute, *In re Mills*, 135 U.S. 263, 267, 10 S.Ct. 762, 34 L.Ed. 107 (1890), and that there can be no such thing as a de facto grand jury. *United States* v. *McKay*, 45 F.Supp. 1007, 1015 (E.D.Mich. 1942). Pursuant to 18 U.S.C. § 3771, the Supreme Court has promulgated Fed.R.Crim.P. 6(g), which provides that "no grand jury may serve more than 18 months." Thus, as we said in *Fein*, an unauthorized extension of the term of a grand jury beyond 18 months is a defect which "goes to the very existence of the grand jury itself," and "[w]e have found no authority which has upheld the validity of an indictment returned by a grand jury whose life had terminated under the clear language of the governing rule." 504 F.2d

at 1173. It is therefore clear that the indictment handed down by the grand jury in the instant case is a nullity.[2]

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[2] In *Gaither* v. *United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969), "[t]he indictment was returned under what [was] evidently the normal procedure followed in [the District of Columbia]." 413 F.2d at 1065. There the grand jury simply "presented" the defendants for larceny, and the foreman of the grand jury signed the "presentment." The United States Attorney's office then drafted an indictment which was signed by the foreman under the traditional certification "A True Bill." The defendants made a timely objection to this procedure. *Id.* at 1065 n.2. The court determined that this procedure was defective, since the grand jury must pass on the actual terms of the indictment that it votes, and accordingly it held, on rehearing, that the indictments against the defendants had to be dismissed. *Id.* at 1084-85. The court ruled, however, that its decision holding the procedure erroneous was not to be applied retroactively. *Id.* at 1082-84. This ruling was followed in *United States* v. *Wilson*, 140 U.S. App. D.C. 220, 434 F.2d 494, 496 (1970). In *Gaither* and *Wilson*, however, there was a duly organized grand jury, which had charged the defendants with the specific crime of grand larceny. While the failure of the jury specifically to vote on the wording of the indictment might have been ground to dismiss the indictment upon a motion timely made, it could not have required a dismissal for lack of jurisdiction, for a properly constituted grand jury did vote on the substance of the charges.

We are aware that Judge Sirica in *United States* v. *Mitchel*, 389 F. Supp. 917, 919-20 (D.D.C. 1975), in denying defendant Haldeman's Rule 34 motion for arrest of judgment, held that a claim that a grand jury had been unlawfully extended does not allege a lack of jurisdiction—the proper basis for a Rule 34, motion. He relied "generally" on *United States* v. *Wilson*, *supra*, which we have distinguished. Moreover, as we noted in *United States* v. *Fein*, *supra*, 504 F.2d at 1178, the Attorney General conceded that the "Watergate" grand jury would expire at the end of 18 months, and obtained statutory authority for its extension from Congress. Act of Nov. 30, 1973, Pub. L. No. 93-172, 87 Stat. 691.

Opinion of the Court of Appeals
Dated September 4, 1975
523 F.2d 193

[6] Our conclusion that the indictment is a nullity necessarily implies that the court was without jurisdiction to hear the case, as Fed.R.Crim.P. 7(a) specifically provides that "[a]n offense which may be punished by imprisonment for a term exceeding one year . . . shall be prosecuted by indictment." The absence of an indictment is a jurisdiction defect which deprives the court of its power to act. Such a jurisdictional defect cannot be waived by a defendant, even by a plea of guilty. Cf. *Smith* v. *United States, supra*, 360 U.S. at 10, 79 S.Ct. at 997.[3]

In making the requirement of an indictment jurisdictional, Rule 7(a) merely codifies what always was considered to be the law. Thus, in *Ex parte Wilson*, 114 U.S. 417, 429, 5 S.Ct. 935, 941, 29 L.Ed. 89 (1885), the Court stated that "the District Court, in holding the petitioner to answer for such a crime . . . without indictment or presentment by a grand jury, *exceeded its jurisdiction*, and he is therefore entitled to be discharged" (emphasis added). Similarly, in *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), the defendant was convicted on an indictment found invalid because it had been amended by the court. The Court held that, "the *jurisdiction* of the offence is gone" because the case was not "properly presented by indictment." *Id.* at 13, 7 S.Ct. at 788 (emphasis added).

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[3] *Smith* involved a charge of kidnapping, pursuant to 18 U.S.C. § 1201, a capital offense. An offense punishable by death requires prosecution by indictment regardless of a defendant's waiver. Fed. R. Crim. P. 7(a) The Court held that prosecution by information "did not confer power on the convicting court to hear the case." 360 U.S. at 10, 79 S.Ct. at 997 (emphasis added).

[7] Nor can the lack of jurisdiction over Macklin be cured by treating the indictment as if it were an information. While prosecution by indictment can be waived, Fed.R.Crim.P. 7(b), the only waiver that could conceivably be found here is the plea of guilty. It would be tempting to hold that since a defendant may waive indictment, a plea of guilty is at least its equivalent. We recognize that one of the grounds for requiring prosecution by indictment is to protect a possibly innocent defendant. And here the defendant has admitted that he is not innocent.[4] Yet the waiver of indictment has been deliberately clothed in formal procedure. It must be made in open court and the defendant must be told the nature of the charge and informed of his rights before he is allowed to consent to the waiver. We cannot erode the protective formality of the rule because of a hard case. The charge to which the appellee pleaded guilty was contained in the very indictment we have held to be a nullity. Macklin has not pleaded to any other written accusation.

The government, in an excellent brief, argues that there is no reason why the unauthorized extension of the term of a grand jury should be deemed to affect the jurisdiction of the court any more than a claim that the composition of the grand jury was illegal and unconstitutional. There is no doubt that where the matter is raised in a habeas corpus or in a § 2255 proceeding long after a conviction, a challenge to the grand jury as unconstitutionally constituted on racial grounds will not avail, because of failure to assert the claim under Fed.R.Crim.P. 12(b)(2).

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[4] Generally, at least after conviction, it has been thought that relief from a guilty plea pursuant to Rule 32(d) ("to correct manifest injustice") is not to be entertained when the defendant makes no claim of innocence. See cases collected in *D'Allesandro* v. *United States*, 517 F.2d 429, 436 n.7 (2 Cir. 1975).

See *Tollett* v. *Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Davis* v. *United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). However, these cases dealt with grand juries that formally existed. Only the composition of the juries was challenged—not upon the ground that any particular jurors were incompetent to serve, but rather on the ground that the racial composition of the otherwise legally constituted grand jury was not in conformity with the constitutional requirement.

[8] The difference, as Chief Judge Mishler stated, is that here the defect is one which renders the grand jury's actions void *ab initio*. There is no such body as a "de facto" grand jury. *United States* v. *McKay*, *supra*, 45 F.Supp. at 1015. Since the so-called grand jury had no power to indict, the court had no jurisdiction over the defendant who, in the absence of knowing waiver, could be prosecuted only by indictment.

In any event, the defendant has been reindicted. We express no opinion on any matter affecting the second indictment.

The judgment is affirmed. The petition for mandamus is dismissed.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that o

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U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County o

State of New York, a BRIEF AND APPENDIX FOR APPELLAN

of which the annexed is a true copy, contained in a securely enclosed

directed to the person hereinafter named, at the place and address sta

Albert Socolov, Esq.
299 Broadway
New York, N.Y. 10007

Evelyn C

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4th day of Feb. 1976

Martha Scharf

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Notary Public, State of New York
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